8-30-2016

State v. McCallum Appellant's Brief Dckt. 43701

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NOS. 43701 & 43738**
Plaintiff-Respondent,	)	
	)	**ELMORE COUNTY**
	)	**NOS. CR 2012-2834 & CR 2014-2439**
v.	)	
	)	
JUSTIN LYNN MCCALLUM,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

_____

BRIEF OF APPELLANT

_____

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

_____

HONORABLE CHERI C. COPSEY
District Judge

_____

ERIC D. FREDERICKSEN
Interim State Appellate Public Defender
State of Idaho
I.S.B. #6555

SALLY J. COOLEY
Deputy State Appellate Public Defender
I.S.B. #7353
P.O. Box 2816
Boise, ID 83701
(208) 334-2712

ATTORNEYS FOR DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

Justin McCallum appeals from his judgment of conviction after a jury found him guilty of one count of lewd conduct with thirteen year old A.M. and one count of felony destruction of evidence for erasing data from his cellular telephone. Mr. McCallum was on probation in another case, after he pled guilty to one count of delivery of a controlled substance. Following the jury trial, Mr. McCallum was sentenced to an aggregate unified sentence of 25 years, with five years fixed, for the lewd conduct conviction, five fixed years on the felony destruction of evidence conviction, and his probation was revoked in the delivery case and his sentence of four years, with one year fixed, was executed. On appeal, Mr. McCallum asserts that insufficient evidence existed to convict him of felony destruction of evidence, and that the district court abused its discretion as his sentences are excessive given any view of the facts. He further contends that the district court abused its discretion in failing to reduce his sentences in light of the additional information submitted in conjunction with his Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motion.

Mr. McCallum also asserts that the district court abused its discretion when it revoked his probation in the delivery case.

Statement of the Facts and Course of Proceedings

Supreme Court Docket No. 43701 (Elmore County case number 2012-2834 (*hereinafter,* the delivery case)) and Supreme Court Docket No. 43738 (Elmore County case number 2014-2439 (*hereinafter,* the lewd conduct case)) have been consolidated for appellate purposes under No. 43701. (R., p.190.)

In the delivery case, in June of 2011, a confidential informant (C.I.) purchased marijuana from David (DJ) McCallum, Justin McCallum's cousin. (2013 Presentence Investigation Report (*hereinafter,* 2013 PSI), p.3.) Justin McCallum was present in the car during the first sale. (2013 PSI, p.3.) After the C.I. made two more purchases from DJ McCallum, both McCallums were arrested, and a metal pipe was found on the floor of the car, at Justin McCallum's feet. (2013 PSI, p.3.) Based on these facts, the State filed an Information alleging Mr. McCallum committed two counts of aiding and abetting delivery of a controlled substance, marijuana, and one count of misdemeanor possession of drug paraphernalia. (R., pp.52-53.) Pursuant to a plea agreement binding on both parties and the court, Mr. McCallum pled guilty to one count of aiding and abetting delivery. (R., pp.57-71.) In exchange, the State agreed to dismiss the remaining counts and recommend four years, with one year fixed, suspended and that Mr. McCallum be placed on probation. (R., p.68.) The district court sentenced Mr. McCallum to four years, with one year fixed, but placed Mr. McCallum on probation for three years. (R., pp.75-83.)

In the lewd conduct case, the night of July 5, 2014, 28 year old Justin McCallum allegedly had one incident of sexual contact with a thirteen year old friend, A.M., with whom he attended Narcotics Anonymous (NA).[1] (Trial Tr., p.139, L.6 – p.140, L.3; p.145, L.5 – p.146, L.13.) A.M. and Mr. McCallum engaged in sexual contact and then had intercourse. (Trial Tr., p.155, L.8 – p.166, L.18.) A.M. had feelings for Mr. McCallum, and only told her parents about the sexual nature of their relationship when her mother took her phone a week later as a disciplinary tool for an unrelated

incident. (Trial Tr., p.149, L.17 – p.150, L.13; p.175, L.3 – p.179, L.22; p.199, L.22 – p.201, L.23.) During the course of the investigation into the lewd conduct charge, Mr. McCallum performed a factory reset[2] on his cellular telephone. (Trial Tr., p.256, L.18 – p.258, L.21.) Sexually explicit text messages were recovered from A.M.'s cellular telephone. (Trial Tr., p.178, Ls.6-8; State's Trial Exhibit 1.) The State filed an Information charging Mr. McCallum with lewd conduct and felony destruction of evidence. (R., pp.229-230.)

Prior to trial, the State filed a motion seeking to use 404(b) evidence at trial. (R., pp.287-301.) The State sought, inter alia, to introduce evidence of text messages and copies of text messages sent between Mr. McCallum and A.M. (R., pp.291-298.) Defense counsel objected, but the district court allowed the State, provided the proper foundation was laid, to introduce all of the messages into evidence. (6/19/2015 Tr., p.31, L.20 – p.34, L.20.)

The case proceeded to trial. (*See* Trial Tr.)

The State called 14 year old A.M. (Trial Tr., p.138, L.18 – 140, L.3.) She testified that approximately a year prior, on July 5, 2014, she spent the night at her grandmother's house. (Trial Tr., p.153, L.22 – p.155, L.23.) She texted with Mr. McCallum for a while, then she snuck out of the house and walked over to his house (uninvited) around midnight. (Trial Tr., p.153, Ls.12-14; p.155, L.16 – p.156, L.5.) A.M. testified that she and Mr. McCallum had been sharing flirtatious text messages, even

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[1] At that time A.M. was attending NA because in 2013, her mother found out A.M. had smoked marijuana. (Trial Tr., p.194, L.18 – p.195, L.20.)

[2] A factory reset is a way to reset a phone back to the way it came out of the factory—it basically wipes everything from the phone, such as the contacts list. (Trial Tr., p.256, Ls.18-25.)

though she knew he was 28 years old. (Trial Tr., p.147, L.21 - p.150, L.13.) A.M. had feelings for Mr. McCallum. (Trial Tr., p.149, L.17 – p.152, L.9.) That night, after A.M. arrived at Mr. McCallum's house, they hugged, and he touched her vagina with his hand under her shorts.[3] (Trial Tr., p.159, L.4 – p.160, L.25.) The couple then laid down on a sleeping bag where Mr. McCallum took off A.M.'s shorts and touched her vagina with his mouth. (Trial Tr., p.161, L.1 – p.1 – p.162, L.25.) Next they had sexual intercourse, during which Mr. McCallum used a condom. (Trial Tr., p.165, Ls.20-24; p.167, Ls.14-16.) After they had intercourse, A.M. borrowed Mr. McCallum's sweatshirt and walked back to her grandmother's house. (Trial Tr., p.169, Ls.9-14.) She testified that she saved copies of some of the text messages from Mr. McCallum in the "memo" function on her cellular telephone. (Trial Tr., p.172, Ls.2-15; State's Trial Exhibits 1, 4-10.) A.M. told her mother and step-father that she had sex with Mr. McCallum after her mother confiscated her phone and A.M. "freaked out" because she knew her mother would see the sexual texts from Mr. McCallum. (Trial Tr., p.177, L.7 – p.179, L.22.) A.M. testified that she did not want to talk to the police about what had happened because she felt like getting Mr. McCallum in trouble was "wrong." (Trial Tr., p.181, Ls.10-17.)

The State called A.M.'s mother. (Trial Tr., p.193, Ls.21-22.) A.M.'s mother testified that she went to pick up A.M. from a friend's house on July 12, 2014. (Trial Tr., p.197, L.10 - p.198, L.6.) A.M. did not come out of the house, causing her mother to wait 20 minutes in an unair-conditioned car. (Trial Tr., p.198, L.6 – p.199, L.18.) A.M.'s mother was angry at A.M., and took her cellular telephone as a punishment. (Trial Tr.,

[3] A.M. testified that she was not wearing underwear. (Trial Tr., p.160, Ls.6-7.)

p.199, L.21 – p.200, L.1.) This made A.M. very agitated, and she told her mother that, if her mother looked in her phone, she would find out that A.M. had sex with Justin. (Trial Tr., p.200, L.7 – p.201, L.23.)

A.M.'s step-father testified that he immediately contacted law enforcement upon learning that A.M. had sex with Mr. McCallum. (Trial Tr., p.215, L.2 – p.216, L.19.)

Mr. McCallum's probation officer, Christin Hobson, testified that Mr. McCallum contacted her on July 24, 2014, and advised that he had changed his telephone number. (Trial Tr., p.227, L.18 - p.232, L.18.)

Officer Kyle Holloway testified that he was called to A.M.'s residence on July 12, 2014. (Trial Tr., p.234, Ls.3-11; p.237, Ls.7-25.) At the house, Officer Holloway was shown A.M.'s phone and several text messages on the phone between A.M. and Mr. McCallum. (Trial Tr., p.239, Ls.4-12.)

Officer Russell Griggs testified that he became involved on July 17, 2014, and he watched an interview of Mr. McCallum and met with A.M.'s parents. (Trial Tr., p.243, l.16 – p.244, L.24.) Officer Griggs testified that he spoke to Mr. McCallum over the phone on July 17, 2014, in an attempt to obtain Mr. McCallum's cell phone, which Mr. McCallum did eventually turn over the next day. (Trial Tr., p.247, L.1 – p.255, L.24.) However, Mr. McCallum had done a factory reset of the phone. (Trial Tr., p.256, Ls.11-25.)

The State next called Officer Natalie Rogers to the stand. (Trial Tr., p.265, Ls.10-24.) Officer Rogers testified regarding her investigation of the incident and her interview of Mr. McCallum. (Trial Tr., p.268, L.15 – p.334, L.21.) She testified that Mr. McCallum initially told here that his cellular telephone had been lost in the lake a

few days ago, but had later admitted that was not true. (Trial Tr., p.280, Ls.3-22; p.284, L.17 – p.285.) He turned the phone over on July 18, 2014. (Trial Tr., p.293, Ls.17-19.)

The last witness called by the State was Detective Joseph (Jim) Nelson. (Trial Tr., p.335, Ls.6-23.) Detective Nelson performed a data extraction on A.M.'s phone. (Trial Tr., p.336, L.5 – p.338, L.20.)

The defense rested without calling any witnesses or making an opening statement. (Trial Tr., p.373, Ls.8-15.)

Ultimately, the jury convicted Mr. McCallum of lewd conduct and of felony destruction of evidence. (Trial Tr., p.405, L.9 – p.406, L.19; R., pp.375-376.)

In the delivery case, eighteen months after being placed on probation, a report of probation violation was filed which alleged that Mr. McCallum violated his probation by being discharged from substance abuse treatment, being charged with lewd conduct, failing to maintain full-time employment, and associating with persons who had used controlled substances without permission. (R., pp.91-127.) Mr. McCallum admitted to violating some of the terms and conditions of his probation, and his probation was revoked. (7/28/15 Tr., p.17, L.11 – p.20, L.6; 10/13/15 Tr., p.41, Ls.11-17; R., p.172, 176-179.) Mr. McCallum filed a timely notice of appeal. (R., pp.182-185.)

At the sentencing hearing, the district court sentenced Mr. McCallum to a sentence of 25 years, with five years fixed, on the lewd conduct charge and five fixed years on the destruction of evidence charge, and it ordered the sentences to run concurrently with each other and with the probation violation. (10/13/15 Tr., p.41, L.18 – p.42, L.6; R., pp.386-389.) Mr. McCallum filed a Notice of Appeal timely from the district court's Judgment of Conviction. (R., pp.398-401.)

Mr. McCallum filed a timely Rule 35 motion in the lewd conduct case asking the district court to reduce his sentence. (R., pp.408-409.) The district court denied Mr. McCallum's Rule 35 motion without a hearing. (R., pp.414-420.)

ISSUES

1. Is there sufficient evidence to support the conviction for felony destruction of evidence?

2. Did the district court err in admitting irrelevant text messages?

3. Did the district court abuse its discretion when it revoked Mr. McCallum's probation in the delivery case?

4. Did the district court abuse its discretion in sentencing Mr. McCallum to twenty-five years, with five years fixed, following his conviction for lewd conduct and felony destruction of evidence?

5. Did the district court abuse its discretion when it denied Mr. McCallum's Idaho Criminal Rule 35 Motion?

ARGUMENT

I.

There Is Insufficient Evidence To Support The Conviction For Felony Destruction Of Evidence

A. Introduction

Because there is no evidence in the record that the subject crime, lewd conduct, was a felony offense, Mr. McCallum's conviction for felony destruction of evidence must be vacated.

B. There is Insufficient Evidence To Support The Conviction For Felony Destruction Of Evidence

When reviewing the sufficiency of the evidence where a judgment of conviction has been entered upon a jury verdict, the evidence is sufficient to support the jury's guilty verdict if there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt. *State v. Herrera–Brito,* 131 Idaho 383, 385 (Ct. App. 1998).

The appellate court will not substitute its view for that of the jury as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. *State v. Decker,* 108 Idaho 683, 684 (Ct. App. 1985). The evidence is considered in the light most favorable to the prosecution. *Herrera–Brito,* 131 Idaho at 385.

Idaho Code Section 18–2603 establishes two classifications for the crime of the destruction, alteration, or concealment of evidence. The first classification is a

misdemeanor offense. The Court of Appeals has held that the elements of the misdemeanor offense are:

1. The defendant knew that an object was about to be produced, used, or discovered as evidence in any legally authorized trial, proceeding, inquiry, or investigation;

2. The defendant willfully destroyed, altered, or concealed that object; and

3. The defendant in acting to destroy, alter, or conceal that object intended to prevent the object's production, use, or discovery.

State v. Peteja, 139 Idaho 607, 610 (Ct. App. 2003) (abrogated by *State v. Yermola*, 159 Idaho 785 (2016).

The statute elevates the misdemeanor to a felony offense where "the trial, proceeding, inquiry or investigation is criminal in nature and involves a *felony* offense." *Yermola,* at 787 (emphasis in original).

Mr. McCallum asserts that there is insufficient evidence in the record to support his conviction because there is no evidence in the record that demonstrates that the subject offense is a felony. In this case, while there is evidence that a criminal investigation began when the officers responded to the call by A.M.'s parents, there is no evidence in the record that the data Mr. McCallum was accused of destroying – the cell phone and the data therein such as text messages, were related to the investigation of a felony offense. None of the five law enforcement officers who testified, Officer Griggs, Officer Hobson, Officer Holloway, Detective Nelson, or Officer Rogers, testified that the item/data destroyed was data sought as part of an investigation into a felony offense. (*See* Trial Tr., p.240, L.23 – p.265, L.8 (Griggs' testimony); p.227, L.18 – p.233, L.19 (Hobson's testimony); p.233, L.21 – p.240, L.20 (Holloway's testimony);

p.335, L.6 – p.353, L.10 (Nelson's testimony); p.265, L.10 – p.335, L.4 (Rogers' testimony).)

The Idaho Supreme Court's recent decision *State v. Yermola*, 159 Idaho 785 (2016), is instructive. *Yermola* was also a case in which the State failed to establish at trial that the crime(s) being investigated were felony crimes. *Id*. at 789. In *Yermola*, the Court analyzed Idaho's willful concealment of evidence statute, which characterizes the crime of willful concealment as a misdemeanor if the evidence concealed concerns a civil matter or a misdemeanor criminal offense, and as a felony, if the evidence concerns "a felony offense." I.C. § 18-2603. In discussing the increase from misdemeanor concealment of evidence to felony concealment of evidence, the Court quoted *Alleyne v. United States*, "Consistent with common-law and early American practice, *Apprendi* concluded that any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are *elements* of the crime." *Id*. at 789 (quoting *Alleyne v. United States*, ___ U.S. ___, 133 S.Ct. 2151, 2160 (2013)).

> [T]he fact that the subject crime is a *felony* offense must be submitted to the jury and proved beyond a reasonable doubt because that fact increases the maximum penalty for the offense.

Id. at 788 (emphasis in original). The Idaho Supreme Court held, in *Yermola*, that "the fact that the subject crime is a *felony* offense must be submitted to the jury and proved beyond a reasonable doubt because that fact increases the maximum penalty for the offense." *Yermola*, 159 Idaho at 788 (emphasis in original). The *Yermola* Court held that "the fact that the inquiry or investigation involved a felony was not proved beyond a reasonable double because the State did not offer any evidence that the criminal offense that was the subject of the criminal inquiry or investigation was a felony." *Id*. at 789. The Court rejected the State's claim that the jury instruction provided sufficient

evidence that the crime being investigated was a felony, because "jury instructions are not evidence." *Id*. The Court found the State's failure to offer evidence on an essential element of a crime was not harmless. *Id*. The Court vacated the conviction for felony concealment of evidence and ordered the district court to sentence the defendant for misdemeanor concealment of evidence. *Id*.

Like the facts of *Yermola*, there is no evidence that law enforcement was investigating a felony crime in this case – the jury was given no evidence that the cell phone, or the data therein, could have concealed evidence of a felony. No law enforcement officers testified that the item or data destroyed was evidence of felony; they testified only that they conducted a criminal investigation without any testimony of the severity of the crime investigated. Although Mr. McCallum was charged with lewd conduct in addition to felony destruction of evidence, the jury was presented with no evidence that this charge was a felony. There is simply no evidence in the record that the destroyed item/data would have demonstrated the commission of a felony. Thus, Mr. McCallum's conviction for felony destruction of evidence must be vacated.

II.

The District Court Erred In Admitting Irrelevant Text Messages

A. Introduction

Mr. McCallum asserts that the district court erred in admitting evidence in the form of text messages and copies of text messages purportedly between Mr. McCallum and A.M. where the majority of the text messages were irrelevant to whether Mr. McCallum had committed lewd conduct or felony destruction of evidence.

Mr. McCallum contends that all but four of the text messages and three of the copied text messages were wholly irrelevant to any proper consideration in the case; and, even if the text messages were relevant to some proper purpose, they were not probative of a fact in dispute, thus any probative value was substantially outweighed by the risk of unfair prejudice. Ultimately, whether Mr. McCallum was texting A.M. about anal sex six days after the alleged crime took place was irrelevant and putting such information before the jury served only to unnecessarily inflame the jury.

B. Standard Of Review

A trial court has broad discretion in the admission of evidence, and its judgment will only be reversed when there has been an abuse of discretion. *State v. Zimmerman*, 121 Idaho 971, 973-74 (1992). However, questions of relevancy are reviewed *de novo*. *State v. Raudebaugh*, 124 Idaho 758, 764 (1993). An I.R.E. 403 balancing determination by the trial court is reviewed for an abuse of discretion. *Grist*, 147 Idaho at 52. This Court exercises free review over questions of law. *State v. O'Neill*, 118 Idaho 244, 245 (1990).

In reviewing a trial court's decision regarding the admissibility of "bad act" evidence under Rule 404(b), Idaho's appellate courts apply differing standards of review to the different steps of the analysis. The questions of whether there is sufficient evidence to establish the "bad act" as fact, and whether the "bad act" evidence is relevant to an issue other than character or propensity, are questions of law which are reviewed *de novo*. *See State v. Joy*, 155 Idaho 1, 8 (2013); *see also Grist*, 147 Idaho at 52 (making it clear that the question of whether there was sufficient evidence of the "bad act" is judged under an objective standard and is actually part of the relevance

analysis). On the other hand, the question of whether the probative value of the evidence was substantially outweighed by the risk of unfair prejudice is reviewed for an abuse of discretion. *Joy*, 155 Idaho at 8.

C. The District Court Erred In Admitting Irrelevant Text Messages

Evidence of Mr. McCallum's alleged crime of lewd conduct included text messages purportedly between him and A.M. While some of these text messages were relevant to whether the lewd conduct occurred, the majority of them were inadmissible as irrelevant and more prejudicial than probative; however, the district court admitted them all, over defense counsel's objections. Such was error as most of the text messages were irrelevant, including, for example, a conversation about future sexual acts.

Relevant evidence means evidence having the tendency to make the existence of a fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. Idaho Rule of Evidence 401. All relevant evidence is admissible except as otherwise provided by the rules of evidence or other applicable rules. I.R.E. 402.

Idaho Rule of Evidence 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show action in conformity therewith." However, the Rule does allow such evidence to be offered to "for *other* purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." I.R.E. 404(b) (emphasis added). The concern underlying this Rule is that "[c]haracter evidence . . . takes the jury away from their primary consideration of the guilt or innocence of the particular crime on trial"

because it induces the jury to believe the defendant is more likely to be guilty because he is a man of criminal, or at least bad, character. *State v. Grist*, 147 Idaho 49, 52 (2009).

The Idaho Supreme Court has set forth the following standard with regard "bad act" evidence under Rule 404(b):

> Admissibility of evidence of other crimes, wrongs, or acts when offered for a permitted purpose is subject to a two-tiered analysis. First, the trial court must determine whether there is sufficient evidence to establish the other crime or wrong as fact. The trial court must also determine whether the fact of another crime or wrong, if established, would be relevant. Evidence of uncharged misconduct must be relevant to a material and disputed issue concerning the crime charged, other than propensity.
>
> . . .
>
> Second, the trial court must engage in a balancing under I.R.E. 403 and determine whether the danger of unfair prejudice substantially outweighs the probative value of the evidence. This balancing is committed to the discretion of the trial judge.

Grist, 147 Idaho at 52 (citations omitted).

Otherwise relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. I.R.E. 403; *Grist*, 147 Idaho at 52. A court must undertake a balancing determination before deciding to exclude evidence under I.R.E. 403; see *State v. Crowe*, 135 Idaho 43, 48 (Ct. App. 2000) (holding that evidence regarding assault victim's mental health was not indicative of memory or credibility and thus of little to no relevance and any marginal probative value was substantially outweighed by danger of confusion of issues for the jury).

Prior to trial, the State filed a 404(b) motion seeking to admit numerous text messages and saved copies of text messages between A.M. and Mr. McCallum

recovered from A.M.'s phone. (R., pp.287-301.) The State sought to have admitted copies of nearly 50 text messages from July 12, 2014, and copies of nine saved text messages purportedly sent to A.M. from Mr. McCallum from June 26, 28, and July 10, 12, 2014, that A.M. had copied and saved on her phone under the memo feature. (R., p.297.) Defense counsel objected to the texts and text copies being admitted at trial as being more prejudicial than probative, irrelevant, and for lack of foundation.[4] (6/19/15 Tr., p.30, L.6 – p.34, L.4.)

The July 12, 2014 text messages the State sought to have admitted were as follows:

> Justin: Y not?
>
> Justin: Y
>
> A.M.: Y not what ?
>
> Justin: U said it wasn't for me
>
> A.M.: Yeah. That text. Other than that its all yours. ;)
>
> Justin: Where's my pic? :(
>
> A.M.: You can wait.
>
> Justin: Then u can to ;-)
>
> A.M.: :(You cant do that. Thats not fair! That didn't happen last time. Nd we still did it.

[4] Defense counsel objected, in part, because the text messages "don't contribute to the allegations." (6/19/15 Tr., p.31, Ls.20-25.) This is a relevance objection, although better practice would certainly have been to use the word, "relevant" when making the objection. *See e.g., State v. Avila*, 137 Idaho 410, 412 (Ct. App. 2002) (holding that defendant's objection on relevance also preserved a Rule 404(b) objection because "Rule 404(b) is a relevance rule, and a Rule 404(b) objection is but a particular type of relevance objection."); *see also State v. Duvalt*, 131 Idaho 550 (1998) (holding an issue is preserved when it has been argued to and decided by the district court).

Justin: Yup I know but u keep teasing me

A.M.: No im not.

Justin: Remember the here it Is come get it pics lol

Justin: You told me u would :(

A.M.: Yeah. U said it I didnt!

A.M.: Nd I was talking future wise .

Justin: I wanted u to

Justin: :(

Justin: Imma cry

A.M.: Mhmmmm sure.

Justin: I am very sad

A.M.: Why?

Justin: Cause Ur body looks so amazing n I can't see it

Justin: I'm pouting now

A.M.: Thats a lieeee. Plus wouldnt you rather hold my amazing body and caress it instead? ;)

Justin: Imma do that also

Justin: But I really am sad :(

A.M.: Awh. Well you could be sad all you want but it aint going to get you anywhere.

Justin: Why u gotta be mean... U know the great sex is worth it ;)

A.M.: Cause im a bitch. (: and I know its worth it. ;)

Justin: maybe I should Put it in Ur butt lol ;)

A.M.: Aint nobody will be happy with that one sweetheart. (;

Justin: Who u referring to?

A.M.: Who do you think?

Justin: U?

A.M.: there ya go sweetie. ;)

Justin: I'd be easy

A.M.: Mhmmm sure.

Justin: Watcha mean?

A.M.: nothing nevermind.

Justin: I would let u push on it n control the speed n depth

A.M.: Oh really? I like being in control! ;)

Justin: Ur lol ass is virgin huh

Justin: Lil*

A.M.: Why would it not be?

Justin: Idk lol u r naughty

A.M.: oh really?

Justin: Lol I don't know war u have n haven't done lol I just know I was Ur second time in that sweet tight pussy.

Justin: Wat*

(State's Trial Exhibit 1.)

The district court ruled that, subject to the State laying the appropriate foundation, the July 12, 2014 text messages were:

> [P]robative and they go to a number of things under 404(b). And they can -- there can be a limiting instruction. So we can instruct them as to what they are to be considered for. But, quite frankly, they -- some of them could be directly admissible as admissions assuming they're able to lay the proper foundation because they appeared to this Court that it's

> arguable these are admissions as to sexual activity, which the State has to prove.
>
> If we step back from that and say they're not admissions -- at least some of them aren't -- they certainly go to knowledge, intent, motive. And they certainly go to motive as to one of the other charges that he's faced with, which is the destruction of evidence -- potential evidence.
>
> So based on all that. Assuming they're able to lay the proper foundation, then I'm going to find that a 403 analysis does not find the probative value to be substantially outweighed by any undue prejudice to the defendant.

(6/19/15 Tr., p.32, L.7 – p.33, L.4.) However, only 4 of the 48 text messages would be relevant to the jury's determination of whether Mr. McCallum engaged in lewd conduct with A.M. Text messages relevant to whether the two engaged in sexual acts the night of July 6, 2014 include:

> . . .
>
> Justin: Why u gotta be mean... U know the great sex is worth it ;)
>
> A.M.: Cause im a bitch. (: and I know its worth it. ;)
>
> . . .
>
> Justin: Lol I don't know war u have n haven't done lol I just know I was Ur second time in that sweet tight pussy.
>
> Justin: Wat*
>
> . . .

(State's Trial Exhibit 1.) The remaining 44 text messages should have been excluded as irrelevant. Evidence of uncharged misconduct must be relevant to a material and disputed issue concerning the crime charged, other than propensity. The State not only had to show that an I.R.E 404(b) exception applied, but it also had to show that the evidence is relevant under I.R.E. 401, and that its probative value is not substantially outweighed by the danger of unfair prejudice, confusing the issues,

misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence, consistent with I.R.E. 403. This it did not do.

Particularly overly prejudicial to Mr. McCallum's defense were the irrelevant text messages dealing with anal sex. Although Mr. McCallum appeared to be discussing a future sex act, it certainly was not relevant or probative as to whether Mr. McCallum engaged in the acts constituting lewd conduct six days earlier, on July 6, 2014. However, such a topic undoubtedly disgusted the jury, thereby unduly prejudicing the defense.

The State also sought to have admitted nine snippets of earlier text conversations, communications purportedly sent by Mr. McCallum which A.M. had saved on her phone from June 26, 28, and July 10, and 12, 2014:

> June 26, 2014: Ur good n I'll still be here to help just can't be saying some of the stuff I was, Im 28 n was flirting with a 13 yr old which is not good plus I never got wat I was askin for so u obviously weren't to interested anyway lol

(State's Trial Exhibit 11.)

> June 28, 2014: That ages are only numbers

(State's Trial Exhibit 9.)

> June 28, 2014: My whole issue of trust would come in the form of gossip...I know I wouldn't be saying anything to ANYONE lol could I trust the same with u?

(State's Trial Exhibit 10.)

> July 10, 2014: I'm picky n Ur a good pick that's just how it is

(State's Trial Exhibit 5.)

> July 10, 2014: Believe it or not Ur the only chick I'm talking to today

(State's Trial Exhibit 6.)

> July 10, 2014: So Ur feinding for a lil more of the big deal huh?

(State's Trial Exhibit 7.)

> July 10, 2014: I think it's great looking... Pretty face perky tits great ass and tight sweet lil pussy Mmmmhmm

(State's Trial Exhibit 8.)

> July 12, 2014: I felt Ur pussy…doesn't seem like you give it up ever lol n I was thinkin more damn Ur fun

(State's Trial Exhibit 4.)

The district court ruled that the memo notes purportedly containing copies of text messages from Mr. McCallum to A.M. were admissible:

> And similar ruling. Not same ruling. But again, these, with a limiting instruction,[5] assuming they're able to establish the appropriate foundation -- and I recognize there's been no agreement as to foundation as to any of these messages.
>
> But in reading these, clearly, it's probative to explain the defendant's motive, intent, and absence of mistake.
>
> And, furthermore, I find in the 403 analysis that the probative value is not substantially outweighed by any undue prejudice to the defendant.
>
> And so, assuming they are able to establish the appropriate foundation, then these messages would come in.

(6/19/15 Tr., p. 34, Ls.5-20.)

The district court found the saved text exchange was admissible to show "the defendant's motive, intent, and absence of mistake;" however, knowledge of A.M.'s age is not an element of the offense of lewd conduct. (State's Trial Exhibits 9, 11.) Further, the fact that Mr. McCallum texted A.M. before the July 6, 2014 incident that he was not

[5] During the jury instructions conference, defense counsel advised the district court he no longer wished for a limiting instruction, for strategic reasons. (Trial Tr., p.382, L.5 – p.383, L.5.)

talking to any other girls that day, his concerns about trust, or that he thinks A.M. was "a good pick" would not tend to prove that Mr. McCallum had intentionally engaged in lewd conduct with A.M. on July 6, 2014. (State's Trial Exhibits 5, 6, 10.) Mr. McCallum's intent was never at issue—he did not claim that the conduct was accidental; when interviewed he said the conduct never happened. (R., pp.206-207.) "[I]ntent must be at issue before evidence of other crimes is relevant." *State v. Roach*, 109 Idaho 973, 974 (Ct. App. 1985).

In *Roach*, the defendant appealed his conviction for lewd conduct with a minor child claiming that evidence of a prior bad act that involved the minor's mother was improperly admitted. *Id.* The State argued that the prior bad acts were admissible because lewd conduct was a specific intent crime, so the prior bad acts were admissible to illustrate the Defendant's intent. *Id.* The Court of Appeals disagreed and found that evidence of prior bad acts of the defendant were not relevant. *Id.* at 975. The Court reasoned that the Defendant's intent was not at issue where the defendant never contended that he committed the acts but with innocent intent or mental defect, and he did not have an alibi defense. *Id.* The Court found that the defendant's "intent is adequately shown by proof of the act." *Id.*

While texts that referenced the prior sex acts were relevant (State's Trial Exhibits 3, 4, 7, 8), any texts after July 6, 2014 that did not explicitly discuss acts that had already occurred could not be relevant to prove the lewd conduct charge (*See* State's Trial Exhibits, 5, 6). Additionally, even if such evidence was minimally relevant, the probative value of the prior bad acts evidence would be substantially outweighed by any prejudicial effect.

The district court erred when it admitted the irrelevant text messages and saved text messages into evidence.

III.

The District Court Abused Its Discretion When It Revoked Mr. McCallum's Probation

Mr. McCallum asserts that the district court abused its discretion when it revoked his probation and executed his original sentence of four years, with one year fixed. He asserts that the violation did not justify revoking probation, especially in light of the goals of rehabilitation and the fact that the protection of society could be best served by his continued supervision under the probation department.

There are generally two questions that must be answered by the district court in addressing allegations of probation violations: first, the court must determine whether the defendant actually violated the terms and conditions of his probation; and second, if a violation of probation has been found, the trial court must then decide the appropriate remedy for the violation. *State v. Sanchez*, 149 Idaho 102, 105 (2009). "The determination of whether a probation violation has been established is separate from the decision of what consequence, if any, to impose for the violation." *Id*. (quoting *State v. Thompson*, 140 Idaho 796, 799 (2004)). Once a probation violation has been found, the district court must determine whether it is of such seriousness as to warrant revoking probation. *State v. Chavez*, 134 Idaho 308, 312 (Ct. App. 2000). Probation may not be revoked arbitrarily. *State v. Adams*, 115 Idaho 1053, 1055 (Ct. App. 1989). The district court must decide whether probation is achieving the goal of rehabilitation and whether probation is consistent with the protection of society. *State v. Leach,* 135 Idaho 525, 529 (Ct. App. 2001). If a knowing and intentional probation violation has

been proved, a district court's decision to revoke probation will be reviewed for an abuse of discretion. I.C. § 20-222; *Leach*, 135 Idaho at 529.

Only if the trial court determines that alternatives to imprisonment are not adequate in a particular situation to meet the state's legitimate interest in punishment, deterrence, or the protection of society, may the court imprison a probationer who has made sufficient, genuine efforts to obey the terms of the probation order. *State v. Lafferty,* 125 Idaho 378, 382 (Ct. App. 1994).

As to the first issue before the district court, Mr. McCallum concedes that he violated a condition of his probation as he admitted that he had done so. (7/28/15 Tr., p.17, L.11 – p.20, L.6.) However, Mr. McCallum asserts that the district court abused its discretion in finding that his probation violation justified revocation. Mr. McCallum asserts that his continued probation would achieve the goals of his rehabilitation and the protection of society.

Although Mr. McCallum's violation was serious, it did not justify revoking his probation. Mr. McCallum admitted to violating the terms of his probation by associating with persons not approved by his probation officer. (R., pp.91-127.) However, Mr. McCallum admitted he violated his probation and took responsibility for his poor decisions to associate with persons not approved by his probation office. (7/28/15 Tr., p.17, Ls.11-20; p.24, L.21 – p.25, L.8.)

In light of the evidence that was presented to the district court, it abused its discretion when revoked Mr. McCallum's probation.

IV.

The District Court Abused Its Discretion When It Imposed Aggregate Unified Sentences Of Twenty-Five Years, With Five Years Fixed, Upon Mr. McCallum Following His Conviction For Lewd Conduct And Felony Destruction Of Evidence

Mr. McCallum asserts that, given any view of the facts, his aggregate unified sentences of twenty-five years, with five years fixed, are excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. McCallum does not allege that his sentences exceed the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. McCallum must show that in light of the governing criteria, the sentences were excessive considering any view of the facts. *Id*. The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id*.

In light of the mitigating factors present in this case, Mr. McCallum's sentences are excessive considering any view of the facts.

An important fact that should have received the attention of the district court is that Mr. McCallum has strong support from family members and friends. *See State v.*

Shideler, 103 Idaho 593, 594-595 (1982) (reducing sentence of defendant who had the support of his family and employer in his rehabilitation efforts). Mr. McCallum received numerous supportive letters—including a letter from his mother, Susan McCallum (2015 PSI, pp.30-31), and letters from his father (2015 PSI, pp.23-29). Mr. McCallum's grandfather and great aunt also wrote letters to the district court to show their support of Mr. McCallum as did various members of the community. (PSI, pp.32-39.) The numerous letters from his friends and family reveal a kind, thoughtful young man, a sincere person with a good heart. (2015 PSI, pp.23-39.)

Further, Mr. McCallum's probation officer commented "Mr. McCallum is a good kid, who makes some stupid decisions." (2013 PSI, p.4.) She also noted that Mr. McCallum was "very respectful" while on probation. (2013 PSI, p.4.)

Based upon the above mitigating factors, Mr. McCallum asserts that the district court abused its discretion by imposing excessive sentences upon him. He asserts that had the district court properly considered his family and community support, it would have imposed less severe sentences.

V.

The District Court Abused Its Discretion When It Denied Mr. McCallum's Rule 35 Motion For A Sentence Reduction In Light Of The New Information Offered In Support Of His Motion

Although Mr. McCallum contends that his sentences are excessive in light of the information in front of the district court at the time of his October 13, 2015, sentencing hearing (*see* Part IV, *supra*), he asserts that the excessiveness of his sentences are even more apparent in light of the new information submitted in conjunction with his

Rule 35 motion. Mr. McCallum asserts that the district court's denial of his motion for a sentence modification represents an abuse of discretion.

A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994). "The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *Id*. "If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction. *Id*.

In support of his motion for a sentence reduction, Mr. McCallum submitted information that his parents offered him a place to stay and would help him complete any treatment. (R., pp.408-409.) Further, Mr. McCallum had employment waiting for him, upon his release. (R., p.408.) Mr. McCallum asked the district court to reduce his sentences to twelve and one-half years, with two and one-half years fixed. (R., p.408.) In light of Mr. McCallum's family support and his waiting employment opportunities, the district court should have reduced his sentences.

Based on the foregoing, in addition to the mitigating evidence before the district court at the time of sentencing, it is clear the district court abused its discretion in failing to reduce Mr. McCallum's sentences in response to his Rule 35 motion.

CONCLUSION

Mr. McCallum respectfully requests that this Court vacate the judgment of conviction for felony destruction of evidence and lewd conduct, and place him back on probation in the delivery case. Alternatively, Mr. McCallum requests that this Court reduce his sentences as it sees fit.

DATED this 30th day of August, 2016.

_____/s/_____
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30th day of August, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JUSTIN LYNN MCCALLUM
INMATE #106751
ISCC
PO BOX 70010
BOISE ID 83707

CHERI C COPSEY
DISTRICT COURT JUDGE
E-MAILED BRIEF

TERRY S RATLIFF
DISTRICT COURT JUDGE
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

SJC/eas